

Officer

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November 14

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CONCORD, N.H.

Mr. Russell B. Tobey, Director
Recreation Division
Forestry and Recreation Commission
State House Annex
Concord, New Hampshire

Dear Mr. Tobey:

This is in reply to your letter of November 7, 1958, in which you request our opinion as to whether there is any limitation on the length of time for which the Forestry and Recreation Commission with the approval of the Governor and Council can lease property under its jurisdiction to third parties. You state that you were under the impression that such leases were limited by law to terms of not more than five years.

The answer to your question appears to lie in a construction of the following statutes:

RSA 4:40 - "Disposal of Real Estate. Upon recommendation of the head of any state department having jurisdiction over the same the governor and council may sell, convey, transfer, or lease any real property owned by the state. . . ."

RSA 219:10 - "Privileges and Concessions. The commission may make contracts for the leasing of privileges and concessions on state forests and reservations, for periods not exceeding five years. All such contracts extending for a period of more than two years or for an annual consideration of more than one hundred dollars shall be approved by the governor and council prior to being effective."

Standing by itself RSA 4:40 imposes no fixed limit on the length of leases of state property to third parties but leaves such determination to the sound judgment of the department concerned and the Governor and Council. The five-year limitation which you had in mind undoubtedly comes from RSA 219:10 and the question presented is to what extent does that statute limit the broad provisions of RSA 4:40.

Mr. Russell B. Tobey, Director

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In our opinion the five-year limitation set forth in RSA 219:10 applies only to contracts for the leasing of "privileges and concessions" and does not apply to leases generally. In other words if the contract is for the grant of a privilege or concession the term cannot be greater than five years but there is no fixed limitation on the term of a regular lease. The difficulty obviously will come in attempting to determine whether a particular contract constitutes a regular lease or is simply the grant of a privilege or concession. I cannot draw the line between the two with any great precision but in a general way the distinction is along the following lines. In a regular lease the lessor grants to the lessee for a fixed term the whole or some defined portion of the premises and retains comparatively little control over the leased premises. The lessee is generally free to use such property for whatever purposes he sees fit except as prohibited by the terms of the lease. Furthermore, where only a portion of the lessor's premises is covered by the lease the lessee is usually free to use such portion for purposes not necessarily related to the use or uses being made of the remainder of the premises by the lessor.

A privilege or concession is generally thought of as in the nature of a grant of permission or the right to use only a portion of certain premises and for some specific purpose. The lessor retains a much greater degree of control over the property which is the subject of the concession than he does in the case of a regular lease. Furthermore, the grant of the concession almost always limits the lessee in his use of the property to a purpose which is incidental or complementary to the main purpose for which the property as a whole is being used. For instance in the case of state parks or reservations the right to establish a soft drink or hot dog stand, or the grant of the right to conduct a horse show and other similar privileges, would be in the nature of concessions. They are purposes which tie in with and complement the main purpose for which the whole area is being used.

I realize that you will continuously run into borderline cases and that it is difficult to draw a fine line between what constitutes a lease and what is simply a privilege or concession. However once this determination is made there is no statutory limitation as to the term of a lease which may be granted, but a privilege or concession cannot be granted for more than five years.

Sincerely yours,

John J. Zimmerman
Assistant Attorney General

JJZ/lt